

Supreme Court, U. S.
FILED

JUN 7 1976

MICHAEL ROBAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

75-1468

No. **██████**

M. MORRIN & SON COMPANY, INC.,

Petitioner,

v.

BURGESS CONSTRUCTION COMPANY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

**BRIEF OF RESPONDENT
BURGESS CONSTRUCTION COMPANY
IN OPPOSITION**

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BRIEF OF RESPONDENT
BURGESS CONSTRUCTION COMPANY
IN OPPOSITION

Respondent, BURGESS CONSTRUCTION
COMPANY ("BURGESS"), hereby files its Brief
in Opposition to the petition for a writ of certiorari

filed before this Court by M. MORRIN & SON COMPANY, INC., ("MORRIN"), to review the decision of the United States Court of Appeals for the Tenth Circuit, entered on November 20, 1975, in *Burgess Construction Co. v. M. Morrin & Son Co.*, 526 F.2d 108.

QUESTIONS PRESENTED

BURGESS believes that the following propositions more accurately present the questions before the Court:

1. Whether the trial court's reconsideration and reversal of initial findings of fact, conclusions of law and judgment, entered at the end of nine interrupted trial days filled with conflicting evidence and complex technical testimony and on the understanding that argument by counsel would be deferred until the hearing of post-trial motions, constitutes a denial of due process of law or a departure from the accepted and usual course of judicial proceedings within the meaning of Rule 19, Revised Rules of the Supreme Court, when:

(a) The case and BURGESS' timely post-judgment motions were extensively argued, pursuant to agreement between the court and counsel, after a complete transcript of the trial testimony and the parties' respective briefs were furnished to the court;

(b) MORRIN thereafter presented two supplemental memoranda and further argument was heard by the court;

(c) Alternative sets of proposed findings of fact, conclusions of law and judgment were submitted by BURGESS' counsel to the court on July 18, 1974, and the set more favorable to MORRIN was finally adopted by the court on August 29, 1974;

(d) MORRIN failed to respond or object to the proposed alternative submissions during the nearly six weeks they were under consideration by the court and thereafter, failed to seek post-judgment relief from the trial court;

(e) MORRIN claims a departure by the trial court from the accepted and usual course of judicial proceedings for the first time in its petition for certiorari having failed to raise such question with the trial court or the Court of Appeals.

2. Whether the Court of Appeals' application of *United States v. Howard P. Foley Co.*, 329 U.S. 64 (1946), in its unanimous affirmance of the judgment of the trial court, interpreting a specially framed and individually negotiated contractual provision, conflicts with decisions of the United States Court of Claims and is such an unwarranted extension of these decisions as to justify review by this Court.

STATEMENT OF THE CASE

This litigation arose from the Bureau of Reclamation "Soldier Creek Dam" project on which BURGESS was the prime contractor, and MORRIN was the concrete subcontractor. BURGESS' successful bid was based on its plan to finish construction of the large

earthen dam in two years. Completion within this two year period required diversion of the Soldier Creek river before the Spring of 1972. This critical date was discussed by MORRIN and BURGESS during contract negotiations and is reflected in a specially worded time for completion provision attached as an exhibit to the subcontract.

Before BURGESS could begin constructing the dam, the river had to be diverted through a concrete lined tunnel. Under its subcontract, MORRIN was obligated to complete the concrete work required for diversion by August 1, 1971, upon condition that it receive access to work sites by April 1, 1971. The subcontract expressly provided for an extension of time equal to any delay in gaining access. Delays in site access occurred; equivalent extensions of time were allowed, but MORRIN was unable to complete the required concrete work in the extended period. The evidence amply established, and the trial court found, that MORRIN should have completed the work within the time provided by the contract including extensions, and that its inability to do so was caused by its own poor performance. MORRIN's work was characterized by the testimony of a Bureau of Reclamation inspector as substandard and inefficient.

Due to MORRIN's failure to perform as contractually required, BURGESS, on January 21, 1972, exercised its contractual right to complete the MORRIN work. MORRIN resisted; BURGESS then commenced this action to enforce its right to take over

the concrete work and for damages under Section 14 of the subcontract. After suit was initiated, MORRIN acquiesced in the take over but subsequently filed a complaint under the Miller Act, alleging breach of contract by BURGESS for delays in providing access to work areas. The two actions were consolidated for trial to the court without a jury. GENERAL INSURANCE COMPANY OF AMERICA, the surety of both parties, was co-defendant in each case.

Commencing on October 16, 1973, the trial extended to Saturday, November 1, 1973, with nine trial days and an intervening continuance due to illness of the court. The testimony was conflicting and complex. Notwithstanding the voluminous and technical nature of the evidence, the court, immediately on completion of the trial, without permitting argument, ordered counsel for MORRIN to prepare proposed findings of fact, conclusions of law and judgment. Declaring that it wanted a judgment entered forthwith, the court stated that arguments would be deferred until BURGESS' post-trial motions were presented.

On November 12, 1973, following a brief hearing on attorney's fees, and with the understanding that arguments would await post-judgment motions, the court signed MORRIN's proposed findings of fact, conclusions of law and judgment, giving MORRIN a quantum meruit judgment for all its unpaid costs plus overhead and profit of \$734,664.00, plus \$79,581.00 interest, and \$203,557.00 attorneys' fees, for a total judgment of \$1,017,802.00.

BURGESS filed timely motions (i) to alter or amend the judgment under Rule 59(e); (ii) for a new trial under Rule 59(a); (iii) to obtain relief from the judgment under Rule 60(b); and (iv) to amend and supplement the findings of fact and conclusions of law under Rule 52. It was agreed that a transcript should be obtained and briefs submitted to the court prior to hearing the motions.

On March 8, 1974, the court and counsel for both parties discussed scheduling the motions. Indicating that it did not believe the motions could be properly heard without the benefit of the full transcript, which was still incomplete, the court stated "the case is far from finished" and added that, having previously been denied the opportunity to argue, the parties would be given the chance to "as thoroughly go into the matter as you desire." Counsel for MORRIN agreed with this procedure acknowledging that it had been outlined by the court at the conclusion of the trial. When the transcript had been completed, counsel stipulated that the motions would be heard on May 9, 1974, with BURGESS submitting a trial memorandum including transcript references on May 1 and MORRIN submitting a responsive memorandum on May 6.

The BURGESS motions were argued for over five hours on May 9. Focusing its attention upon the special "time of performance" provisions of the subcontract, the court carefully reviewed the finding of breach by BURGESS. The court also heard argument on the insufficiency of proof of MORRIN's damages,

and indicated that even if a breach by BURGESS was sustained, MORRIN's testimony on damages might, nonetheless, be inadequate and require further evidence.

MORRIN submitted a supplemental brief, dated May 14. The court ordered further argument on June 28, 1974. Shortly before this second hearing, MORRIN submitted another supplemental memorandum. After argument on June 28, the court announced reversal of the initial decision and ordered BURGESS to submit proposed findings of fact, conclusions of law and judgment.

Two sets of findings of fact, conclusions of law and judgment were submitted by BURGESS on July 18, 1974. While substantially identical, one found damages of \$737,454.00 — \$330,345.00, the amount BURGESS expended to complete MORRIN's work over the compensation provided by the subcontract, plus \$407,109.00, the amount of consequential damages that BURGESS had sustained because of MORRIN's unduly prolonged performance. The second set of findings did not include consequential damages. MORRIN failed to respond to the submittals. Finally, on August 29, 1974, the court entered the findings of fact, conclusions of law and judgment in the lesser amount of \$330,345.00, plus interest with no consequential damages. MORRIN thereafter made no attempt to seek relief from the trial court, but undertook an appeal to the United States Court of Appeals for the Tenth Circuit.

Determining that the evidence was sufficient to support the trial court's findings, the Court of Appeals unanimously affirmed the judgment below. The propriety of the proceedings before the trial court was neither challenged before the trial court nor briefed or argued on appeal.

ARGUMENT

I. MORRIN'S ALLEGATION OF PROCEDURAL IRREGULARITIES IS WITHOUT SUBSTANCE, WAS NOT RAISED BEFORE THE TRIAL OR APPELLATE COURTS AND FAILS TO PRESENT AN ISSUE MERITING REVIEW BY THIS COURT.

MORRIN's petition relies almost entirely upon an argument which is now raised for the first time in the course of this litigation, i.e., alleged impropriety by the trial court, which, it is claimed, justifies exercise of this Court's supervisory powers. Shorn of all rhetoric and in light of the record, the claimed impropriety reduces itself to two essential allegations: (1) the trial court reconsidered and reversed its initial decision; and, (2) in so doing, it entered, without due consideration, findings, conclusions and a judgment drafted by counsel for BURGESS. The second allegation is erroneous and presents no basis for reversal. Neither allegation constitutes a departure from accepted or fair procedure; neither warrants review by this Court.

A. *The Trial Court's Reconsideration and Reversal of Initial Findings, Conclusions and Judgment Did Not Constitute a Departure From the Accepted and Usual Course of Procedure Within the Meaning of Rule 19 or a Denial of Due Process of Law.*

MORRIN's petition implies that the proceedings below were tainted because a decision was "summarily announced from the bench" and substituted findings and conclusions were entered "without hearing or modification."¹ This implication is erroneous. Indeed, ironically, the only decision "summarily announced from the bench" was the initial one later reconsidered by the court. The only findings and conclusions which were entered without the benefit of argument were those drafted by MORRIN's counsel and subsequently vacated. The final findings and conclusions were made and entered after both counsel and the court had the benefit of a complete transcript of evidence; after both parties were accorded full oral argument; after several extensive briefs were filed and considered; and after the court considered for six weeks before signing the proposed findings, with no motion, response or objection from MORRIN to the trial court during that six week period or thereafter.²

Certainly no departure from accepted procedure occurs when a trial judge reconsiders and vacates, or otherwise modifies earlier findings, conclusions and judgment. To maintain otherwise would eviscerate those

¹ MORRIN's petition at 6.

² The opinion of the Court of Appeals sets forth the procedural sequence. See 526 F.2d 108, 110-11.

provisions of the Federal Rules of Civil Procedure which specifically provide the machinery for accomplishing that very result.³ Equally certain is that no denial of due process occurs when a litigant has been afforded the ample opportunity to present and to have its case carefully considered that MORRIN has here enjoyed. Only after extensive briefing and argument and thorough review following BURGESS' timely post-judgment motions, did the court, finally with the aid of a complete transcript of the evidence, determine to vacate the initial findings, conclusions and judgment.

MORRIN however argues that because of inconsistencies between the trial court's initial findings and comments on the evidence during trial and its subsequently entered findings it was somehow deprived of due process of law. The Court of Appeals stated correctly that:⁴

The fundamental issue in this appeal is whether Burgess was contractually bound to give Morrin access to work sites on the dates stated in the contract.

That issue has been fundamental throughout this litigation. Manifestly, the trial court's initial findings with respect to breach by BURGESS, seasonal conditions contemplated for MORRIN's work, BURGESS' liability for increased costs, MORRIN's performance and BURGESS termination thereof would all be materially altered by its resolution of that critical issue. Alteration of initial findings concerning disputed and in-

³ Fed. R. Civ. P. 52, 59(a) and (e), 60(b).

⁴ 526 F.2d at 112.

tricate evidence, which were revealed, in light of extensive briefing, argument and consideration, to have been in error is no deprivation of due process, but rather essential to it and the duty of a scrupulous and responsible trial court.

B. The Trial Court's Ultimate Adoption of Findings and Conclusions Drafted by Counsel was the Result of Extensive Consideration and Independent Judgment; Those Findings are Amply Supported by the Evidence and were Correctly Upheld by the Court of Appeals.

Because findings and conclusions, consistent with the trial court's decision, were prepared by counsel and ultimately entered without modification, MORRIN asserts that the trial court abdicated its responsibility and mechanically relied upon counsel's handiwork in a manner violative of due process.⁵ However, the procedural sequence culminating in the eventual entry of one of two alternative sets of findings and conclusions after six full weeks consideration refutes any such assertion. Indeed this sequence of events dramatically demonstrates that the ultimate decision was the independent and considered judgment of the trial judge after having "considered the case from all angles . . . before placing reliance on the proposed findings." *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962). This is apparent in the trial court's final comments:

⁵ The initial findings and conclusions were prepared by MORRIN's counsel after the conclusion of evidence on Saturday, November 10, 1973, and signed verbatim by the court on Monday, November 12, 1973.

THE COURT: Alright, thank you very much. I have had you down here several times, and I think I have really gotten the grasp of this situation. This is my best judgment.

Thus, the initial position the trial court had summarily taken was reversed only after careful consideration was given to the extensive briefs and lengthy argument of counsel presented with the benefit of the full transcript.

In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964), this Court held that even though the findings were "adopted verbatim . . . [and] though not the product of the workings of the district judge's mind, [they] are formally his; . . . and they will stand if supported by evidence." The Court of Appeals for the Fifth Circuit placed this concept in practical perspective:

In the workaday world, however, it may often be necessary for a hard-pressed district court to take assistance from counsel in articulating his decision. . . . The ultimate question that the judge must face is whether to enter judgment for plaintiff or defendant, and he must decide this question on his own before deciding which proposed findings to accept. Since his mind must range over the same questions to make this decision that it would to write the findings the result will be the same, and his factual determination should, as in any other case, be set aside only if clearly erroneous.

* * *

When substantial evidence supports a finding it will not be found erroneous merely because the expression of the finding was adopted from a proposal by counsel. (Citation omitted).

Louis Dreyfus, supra at 738-39. *Accord, Professional Golfer's Ass'n v. Bankers Life & Casualty Co.*, 514 F.2d 665 (5th Cir. 1975); *Schwerman Trucking Co. v. Gartland S.S. Co.*, 496 F.2d 466 (7th Cir. 1974); *Nissho-Iwai Co. v. Star Bulk Shipping Co.*, 503 F.2d 596 (9th Cir. 1974). Likewise, no denial of constitutional safeguards occurs merely because the trial court sought assistance of counsel in preparation of findings and conclusions consistent with its considered decision. Responding to an argument similar to that now advanced by MORRIN, Justice (then Judge) Blackmun held that the adoption of findings, initially drafted by counsel, if supported by the evidence and drafted in a careful, specific manner, constituted

. . . no abandonment of the judicial process and certainly nothing which approaches the level of a deprivation of constitutional due process. The findings and conclusions, accordingly, are entitled to their usual weight.

Bradley v. Maryland Casualty Co., 382 F.2d 415, 423 (8th Cir. 1967).

The Court of Appeals noted that "the evidence was conflicting in varying degrees on every major point and contention."⁶ In asserting that certain findings are clearly erroneous, MORRIN's petition distorts the testimony and completely disregards the evidence adduced by BURGESS and, thus is based on the untenable premise that the operative facts are to be determined exclusively from MORRIN's evidence rather

⁶ 526 F.2d at 116.

than the entire record. As the Court of Appeals suggested: "Were we to look only at MORRIN's evidence, we might be able to agree with its contentions, but we must look at the whole record."⁷

Correctly applying this fundamental principle, the Court of Appeals reviewed and upheld the trial court's findings and conclusions including each of the four "critical" findings and conclusions now claimed erroneous by MORRIN.⁸ The Court of Appeals found MORRIN's assertion (a), relating to time of completion of site preparation work to be without merit because delays in all work areas except the relatively small gate chamber area were insignificant and that "the gate chamber was available for pouring concrete . . . on December 7, 1971";⁹ its assertion (b), relating to the availability of extensions by reason of winter work,¹⁰ to be unfounded because the "evidence also indicated winter work was contemplated when the contract was entered, . . . winter work did not materially change the nature of MORRIN's performance",¹¹ and delays resulting in winter work were due to MORRIN's own inefficiencies.¹²

Assertion (c), relating to increased costs to MORRIN for changes and changed conditions allegedly resulting from site access delay, was held to be without

⁷ *Id.*

⁸ MORRIN's petition ¶5, at 9-10.

⁹ 526 F.2d at 116.

¹⁰ It should be noted, contrary to MORRIN's assertion, that the trial court in its initial findings never found that *force majeure* conditions existed.

¹¹ *Id.* at 112.

¹² *Id.*

significance because the increased costs were also due to MORRIN's inefficiencies and poor performance, no contractual claims were made and BURGESS did not breach the subcontract. As the Court of Appeals noted, not only was there "no contention that BURGESS acted in bad faith, "but also the evidence established that BURGESS' "delay was not unreasonable or due to its fault," and "that it was not the intent of the parties to bind BURGESS to pay damages should delay . . . occur." ¹³

Assertion (d), relating to MORRIN's claimed set-off, was summarily disposed of by the Court of Appeals for it was obvious that a setoff was, in effect, allowed MORRIN for \$173,586.57, the amount earned but unpaid as of January 21, 1972, the date of termination. This offset was not separately delineated because it was not included in Finding 28B as an item of BURGESS' damage, viz., "Payments to MORRIN for work performed under the Subcontract" having never been paid. If said amount had been included as an item of damage, it would have been proper to include it as an offset, due MORRIN, with the resulting damage figure of \$330,345.88 remaining unchanged.

Contrary to MORRIN's claim,¹⁴ counsel for BURGESS never acknowledged that MORRIN was entitled to additional costs as a result of scheduling changes. Moreover, as the Court of Appeals noted, the evidence was clear that MORRIN's schedule of oper-

¹³ 526 F.2d at 115.

¹⁴ MORRIN's petition at 4.

ations was for the convenience of BURGESS in coordinating the overall construction. It did not guarantee that MORRIN would be allowed to work in the sequence its schedule proposed.¹⁵ Finally, MORRIN was not wrongfully denied recovery for additional work because, in fact, it performed no significant additional work.¹⁶

This case presents no basis for grant of certiorari. The trial court did not depart from the accepted and usual course of judicial proceedings; the record compellingly shows that the decision of the trial court was based upon its own carefully considered, independent judgment after extensive opportunity to be heard was afforded both parties. Scrutinizing the record as a whole and not just MORRIN's evidence, the Court of Appeals applied the proper standard of review determining that there was substantial evidence supporting each of the findings which MORRIN assailed as clearly erroneous. Further review by this Court is unwarranted.

II. THE APPLICATION BY THE COURT OF APPEALS OF *UNITED STATES v. HOWARD P. FOLEY, SUPRA*, IS CORRECT UNDER THE FACTS OF THE INSTANT CASE; IS CONSISTENT WITH U.S. COURT OF CLAIMS DECISIONS, AND DOES NOT PRESENT A SIGNIFICANT QUESTION WARRANTING REVIEW BY THIS COURT.

¹⁵ 526 F.2d at 116.

¹⁶ *Id.*

In a cursory manner, MORRIN next asserts that certiorari is justified because *United States v. Howard P. Foley, Co., supra*, is not apposite to the facts of this case and has been applied contrary to its express limitations. However, *Foley's* holding that delay in providing site access does not constitute a breach when an extension of time provision provides the contractor's sole remedy, is patently applicable here. Further, as the trial court found, BURGESS made no promise relative to site access other than to grant a time extension equal to the time that access was delayed beyond April 1, 1971. Delays contemplated in the contract clearly did not constitute a breach, but merely non-occurrence of conditions,¹⁷ entitling MORRIN to a time extension which it received.

After careful review, the Court of Appeals rejected MORRIN's contentions with respect to *Foley*.¹⁸

MORRIN further contends that the Court of Appeals' decision conflicts with three decisions of the Court of Claims: *H. R. Henderson & Co. v. United States*, 169 Ct. Cl. 228 (1965); *Abbett Electric Corp. v. United States*, 142 Ct. Cl. 609, 162 F. Supp. 772 (1958); *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947). Examination of these cases, however, reveals that they are obviously distinguishable, presenting no conflict.

Henderson involved a claim for increased costs resulting from construction sequence changes. No allega-

¹⁷ 526 F.2d at 113.

¹⁸ *See Id.* at 114-15.

tion was made that the sequencing changes constituted a breach of contract. The only issue was the claimant's right to extra compensation pursuant to the changes clause of the contract. Here, however, MORRIN claimed breach and asserted no claim for extra compensation under the contract. Moreover, while MORRIN did submit a proposed schedule, it was expressly subject to approval and modification by BURGESS.

In *Abbett*, a contractor sued to recover increased costs for the installation of a transmission line. Unlike *Foley* and the case at bar, the Government in *Abbett* did covenant to give notice within a certain time to the contractor to proceed with its work.¹⁹

Fuller, like *Foley*, involved application of the principle that unreasonable delay violates an implied obligation not to hinder or delay the other parties' performance, absent a contractual provision contemplating and excusing the delay, such as is here involved. In *Fuller*, however, the court was careful to note that no such provisions were present and that the Government had agreed to furnish the models needed by the plaintiff contractor for its performance "without condition" and "as soon as the contractor needed them".²⁰ The Court of Appeals was cognizant of these distinguishing factors when it cited *L. L. Hall Construction Co. v. United States*, 177 Ct. Cl. 870, 379 F.2d 559, 563 (1966), as having harmonized *Fuller* and *Foley* under the following rule:²¹

¹⁹ 162 F. Supp. at 773.

²⁰ 69 F. Supp. at 415.

²¹ 526 F.2d at 114.

[T]he questions on which liability turns . . . are whether defendant was the cause of the delay here, whether it failed to use reasonable diligence and good faith in performance of its responsibilities under the contract, and whether the contract contemplated and excused the delays.

Applying this rule to the facts here presented, the Court of Appeals concluded that the trial court's holding that the subcontract contemplated delay and that BURGESS was not liable for damages resulting therefrom, was supported by the evidence and should be affirmed. Further, it said that even if the extension of time was not the sole remedy, MORRIN still could not recover because BURGESS acted in good faith, its delay was not unreasonable or due to its fault and, therefore, did not constitute a breach of an implied promise not to hinder or delay the subcontractor.²² Thus, the decision below is fully consistent with *Foley* and progeny and correct under the facts of this case.

MORRIN's final assertion that this case will have a "drastic impact" upon government contractors because the trial court erroneously construed a standard contract provision²³ is substanceless. The special provision at issue here setting forth the time of performance of the subcontract, conditioned upon the date of delivery of sites, was specifically negotiated by the parties and set forth in a separate exhibit attached to the subcontract.²⁴ Therefore, MORRIN's suggestion that the court in-

²² *Id.* at 115.

²³ MORRIN's petition at 11.

²⁴ 526 F.2d at 114 n.3.

terpreted a standard contractual provision in a manner raising broad ramifications for the construction industry is incorrect.

The well reasoned decision of the Court of Appeals is thus not only fully supported by the evidence adduced at trial and consistent with the decisions of this Court and those of the other circuits, but also presents no conflict with the above cited Court of Claims cases and raises no question of general significance warranting this Court's review.

CONCLUSION

For the foregoing reasons the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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